

# TJAGSA Practice Note

Faculty, The Judge Advocate General's School, U.S. Army

## Administrative and Civil Law Note

### New Army Regulation on Fatal Training and Operational Accident Collateral Investigations and Family Presentations

The Army has published new guidance on fatal training and operational accident collateral investigations, and presentations to next of kin. *Army Regulation (AR) 600-34*, effective 2 February 2003,<sup>1</sup> implements a congressional requirement to ensure that commands make fatality reports of service members who die in the line of duty available to family members.<sup>2</sup> Judge advocates must be familiar with this new regulation as it contains specific guidelines for conducting collateral investigations into these accidents and requires SJAs to support their commands in presenting accident investigation reports to family members.

First, the regulation provides guidance on conducting collateral investigations of fatal training and operational accidents. The regulation defines a "training related death" as "an accidental loss of life associated with a noncombat military exercise or training activity that is designed to develop a soldier's physical ability, or to maintain and increase a soldier's collective combat and peacekeeping skills."<sup>3</sup> An "operational related death" is one "[a]ssociated with [an] active duty military exercise or activity occurring in a designated war zone or toward designated missions related to current war operations or military operations other than war, contributing directly or indirectly to the death of the soldier."<sup>4</sup>

Commanders must conduct these investigations under *AR 15-6*,<sup>5</sup> *AR 385-40*,<sup>6</sup> and the new regulation, *AR 600-34*. The

most significant new requirements for conducting these investigations are the timelines for completing investigations and the interim reporting requirements when investigations are not completed within the required time period. The regulation requires the investigating officer to submit the report of investigation to the appointing authority<sup>7</sup> within thirty days from the date of the accident. In response to a written request showing good cause, the appointing authority may grant the investigating officer delays, but only in ten-day increments.<sup>8</sup> If the appointing authority grants an extension, he is responsible for the release of status information from the investigation, first to the primary next of kin (PNOK)<sup>9</sup> and then to the public, if necessary.<sup>10</sup> The regulation requires the legal office to review each update and the final presentation to ensure that they do not contain any admission of liability, waiver of a defense, offer of compensation, or statement that might jeopardize the Army's litigation posture.<sup>11</sup>

Once the collateral investigation is complete, the new regulation requires the appointing authority to offer a family presentation based on the report of investigation to adult PNOK on all fatal training and operation accidents, as well as suspected cases of friendly fire and special interest cases of probable high public interest, as determined by The Adjutant General.<sup>12</sup> The PNOK must receive the report of investigation first, followed by members of Congress and local civic officials whose constituents were casualties, and finally, the media.<sup>13</sup>

The appointing authority must coordinate the appointment of a briefer, who is most often the deceased soldier's colonel or brigade-level commander.<sup>14</sup> At a minimum, the briefing team consists of a briefer, the family's casualty affairs officer, and a chaplain from the unit in which the mishap occurred. The team

1. U.S. DEP'T OF ARMY, REG. 600-34, FATAL TRAINING/OPERATIONAL ACCIDENT PRESENTATIONS TO THE NEXT OF KIN (2 Jan. 2003) [hereinafter AR 600-34].

2. See The National Defense Authorization Act for Fiscal Year 1993, Pub. L. No. 102-484, div. A, tit. X, subtit. H, § 1072, 106 Stat. 2508 (reprinted at 10 U.S.C. § 113 (2000)) [hereinafter NDAA for FY 1993]. The Army first implemented this requirement in Message, 011252Z Mar 01, Dep't of Army Chief of Staff, subject: Providing Results of Fatal Training Accident Investigations to Soldier's Next of Kin (NOK).

3. AR 600-34, *supra* note 1, at glossary.

4. *Id.*

5. U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (30 Sept. 1996) [hereinafter AR 15-6].

6. U.S. DEP'T OF ARMY, REG. 385-40, ACCIDENT REPORTING AND RECORDS (1 Dec. 1994) [hereinafter AR 385-40].

7. Usually the General Court-Martial Convening Authority (GCMCA). See AR 600-34, *supra* note 1, para. 3-2; see also AR 15-6, *supra* note 5, para. 2-1a(3) (providing that only a GCMCA may appoint an investigation into incidents resulting in death).

8. AR 600-34, *supra* note 1, para. 3-6. The thirty-day requirement to complete the investigation is based on the congressional requirement to notify the soldier's family members of certain facts within thirty days of the date of notification of the soldier's death. The specific notification requirements include: notice that the accident is under investigation; the names of the agencies within the Department of the Army conducting the investigation; and notice of the existence of any reports of such agencies that have been or will be issued. The Army must also furnish the family members with a copy of the investigation. See NDAA for FY 93 § 1072(a)(2).

may also include a legal advisor or public affairs officer if a family has invited, or may invite, a family legal representative or local media members to attend the presentation.<sup>15</sup>

The new policy requires the briefer to present facts to the family in three areas. First, the briefer must provide an explanation of the unit's mission, focusing on the soldier's significant contributions to the unit, its mission, and the Army. The briefer must then give an accurate account of the facts and circumstances surrounding the accident, focusing on releasable portions of the collateral investigation report.<sup>16</sup> Finally, the briefer must explain any corrective action that the Army has taken.<sup>17</sup>

The SJA or legal advisor performs several reviews before the presentation. The SJA or legal advisor redacts the collateral investigation report as necessary to comply with the Privacy Act and Freedom of Information Act<sup>18</sup> and prepares copies for the family members. The SJA must also prepare a letter to the family explaining the reasons for the redaction.<sup>19</sup> The SJA or legal advisor also conducts a legal review of all materials that the briefer intends to use during the rehearsals and the actual presentation, including bullet briefing charts, notes, and executive summaries.<sup>20</sup> If family members ask questions during the presentation that are appropriately answered by a legal advisor, the briefer must forward the questions to the legal advisor, who may follow up directly with the PNOK.<sup>21</sup>

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9. See U.S. DEP'T OF DEFENSE, INSTR. 1300.18, MILITARY PERSONNEL CASUALTY MATTERS, POLICIES, AND PROCEDURES para. E2.1.1.25 (18 Dec. 2000). This instruction defines "primary next of kin" as:

[t]he person must [be] closely related to the casualty . . . . The unmarried surviving spouse is primary NOK. The term surviving spouse does not include one who obtained a divorce from the decedent (at any time). Other NOK and interested parties are recognized in the following order:

E2.1.1.25.1. Natural and adopted children in order of seniority. The age of majority is 18 years. The rights of minor children, with the exception of disposition of remains, shall be exercised by their surviving parent or legal guardian (Minor children are not entitled to make disposition of remains).

E2.1.1.25.2. Parents in order of seniority, unless legal exclusive (sole) custody was granted to a person by reason of a court decree or statutory provision.

E2.1.1.25.3. The remarried surviving spouse. The term remarried surviving spouse does not include one who obtained a divorce from the decedent (at any time) or who remarried before a finding of death . . . .

E2.1.1.25.4. Blood or adoptive relative who was granted legal custody of the person by a court decree or statutory provision.

E2.1.1.25.5. Brothers or sisters of legal age in order of seniority.

E2.1.1.25.6. Grandparents in order of seniority.

E2.1.1.25.7. Other relatives of legal age in order of relationship to the individual according to civil laws. Seniority controls when persons are of equal degree of relationship.

E2.1.1.25.8. Person standing in loco parentis to the decedent. Seniority in age will control when the persons are equal [in] relationship.

*Id.* For PNOKs under the age of eighteen, the adult custodian determines the PNOK's ability to receive a face-to-face presentation. See AR 600-34, *supra* note 1, para. 4-1.

10. See AR 600-34, *supra* note 1, para. 4-2e (requiring that the approval authority provide status information in the form of updates in accordance with AR 600-8-1, *ch.* 7). This regulation provides that the installation/community casualty working group coordinates staff actions associated with casualty reporting, to include maintaining communication with the family for follow-up action, and ensuring that the casualty affairs officer monitors the progress of the investigation for updated information. U.S. DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY OPERATIONS/ASSISTANCE/INSURANCE (20 Oct. 1994).

11. AR 600-34, *supra* note 1, para. 4-2e.

12. *Id.* para. 4-1.

13. *Id.* para. 6-2.

14. *Id.* para. 2-1f.

15. *Id.* para. 2-3.

16. *Id.* para. 3-6a. The regulation is not intended to provide the PNOK with information not otherwise releasable under the Freedom of Information Act, 5 U.S.C. § 552 (2000), and the Privacy Act, 5 U.S.C. § 552a. AR 600-34, *supra* note 1, para. 3-6a.

17. AR 600-34, *supra* note 1, para. 2-4c.

18. See *supra* note 16.

19. AR 600-34, *supra* note 1, paras. 3-6g, 4-3h(5).

20. *Id.* paras. 4-3h(6), 5-2c.

21. *Id.* para. 5-4d.

All judge advocates and Department of the Army civilian attorneys providing advice to commanders and investigating officers must be familiar with the more specific requirements for conducting collateral investigations into fatal training and operational accidents. Among other things, it will enable them to assist the command in meeting the required timelines. More-

over, SJA offices must understand their role in family presentations and generally assist the command in carrying out the very important mission of providing a deceased soldier's family with needed information in a professional and caring manner. Lieutenant Colonel Stahl.